In the Supreme Court

OF THE

United States

FILE COPY

OCTOBER TERM, 1930

No. [redacted] 27

In the Matter of
SASSARD & KIMBALL, INC.,
Bankrupt,
and
WM. H. MOORE, JR., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,
Appellant and Petitioner,
vs.
O. S. BAY,
Appellee and Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Petition for Review in Bankruptcy Taken by Said Petitioner Against O. S. Bay Lately Pending in Said Circuit Court of Appeals

and

BRIEF IN SUPPORT THEREOF.

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Comes now Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt by Charles F. Hutchins, Esq., its counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the

Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said Court to certify to this Court for its review and determination, a certain cause in said Court of Appeals, lately pending, wherein the respondent O. S. Bay was appellee and your petitioner Wm. H. Moore, Jr., as Trustee in Bankruptcy for the estate of Sassard & Kimball, Inc., Bankrupt was appellant, and to that end it now tenders its petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

CHARLES F. HUTCHINS,
Attorney for Petitioner.

FRANK C. WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Of Counsel.

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to the United States Circuit Court of Appeals for the Ninth Circuit Requiring It to Certify to the Supreme Court of the United States for Its Revision and Determination the Petition for Review in Bankruptcy Taken by Said Petitioner Against O. S. Bay Lately Pending in Said Circuit Court of Appeals.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Wm. H. Moore, Jr., as Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, filed by virtue of the provisions of Section 25-D of the Bankruptcy Act of 1898 as amended by the Act of May 27, 1926, and Section 240 of the Judicial Code of the United States, respectfully represents as follows:

I.

That this cause involves a question of far reaching importance to mercantile and business interests and upon which the decisions of the Circuit Court of Appeals in the different Circuits are at variance, thus necessitating an authoritative determination thereupon by this Court.

II.

That the United States Circuit Court of Appeals for the Ninth Circuit has in this case construed Section 65-A of the Bankruptcy Act of 1898 in a manner which your petitioner believes to be untenable and in conflict with the weight of authority thereon and in conflict as well with an applicable decision of this Court.

III.

The questions involved are as follows:

a. When a trustee in bankruptcy, exercising the rights conferred upon him under and by virtue of Section 47-A, Subdivision 2, sets aside a transfer or mortgage of the bankrupt's property, void under

State law as to existing creditors at the time of the execution of the transfer or mortgage, under the provisions of Section 70-E of the Bankruptcy Act of 1898, does he set aside the transfer or mortgage in its entirety, rendering it wholly null and void, or does he set it aside only to the extent of the amount of creditors' claims existing at the time the void transfer was made or the void mortgage given?

b. When a trustee in bankruptcy avoids a transfer or a mortgage of the bankrupt's property, void under State law as to existing creditors, does he distribute the proceeds derived therefrom among all of the creditors of the bankrupt holding provable claims against his estate, or does he distribute the proceeds only to the class of creditors who could have avoided the transfer under State law had bankruptcy not intervened?

c. May the holder of a mortgage, declared by the laws of the State in which the property is situated, to be conclusively presumed to be fraudulent and void as to the bankrupt's existing creditors at the time of the execution of the mortgage, be paid in full out of the proceeds of the sale of the transferred property recovered, ahead of unsecured creditors of the bankrupt with provable claims, whose claims accrued subsequently to the execution and recordation of the void mortgage?

IV.

The proceedings in the Courts below, briefly stated, are as follows:

a. Sassard & Kimball, Inc., the bankrupt, was at all times before the 23rd day of November, 1928, and up to and including the 31st day of December, 1929, the date of the filing of the voluntary petition herein, a merchant engaged in selling automobiles, automobile parts and accessories at Huntington Park, California. On December 31, 1921, it filed a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of California, Central Division, and on the same day Wm. H. Moore, Jr., was appointed Receiver in Bankruptcy, took possession of the assets, including the property in litigation here, and was later elected Trustee in Bankruptcy for the bankrupt estate.

The property involved in this litigation consisted of all the furniture, show room equipment and shop equipment in the place of business of the bankrupt at Huntington Park, California, and two automobiles.

On November 23, 1928, a chattel mortgage covering all of the above mentioned property was executed by Sassard & Kimball, Inc., acknowledged on November 30, 1928, and an affidavit of good faith, as required by the laws of the State of California (Section 2957, Civil Code of California) was executed on December 5, 1928. The chattel mortgage was not recorded in the office of the County Recorder of Los Angeles County, California, where the property covered thereby was situated, until December 19, 1928. Said chattel mortgage was given to secure a promissory note dated November 23, 1928, for the sum of $10,000.00 payable to Sylvan G. Bay, due thirty days after date. A few days after the recordation of the chattel mortgage in

question, Sylvan G. Bay assigned the chattel mortgage and the promissory note secured by it, to the appellee, Dr. O. S. Bay without recourse.

At the time of the execution of the chattel mortgage in question, there were existing creditors of the bankrupt, Sassard & Kimball, Inc., who had remained creditors continuously and at all times since, up to, and including December 31, 1929, were creditors of the bankrupt herein, Sassard & Kimball, Inc.

Between the date of the execution of the chattel mortgage and the date of its recordation, other persons, firms and corporations became creditors of the bankrupt, Sassard & Kimball, Inc., which said persons, firms and corporations have at all times since been creditors, and now are, creditors of said bankrupt.

That subsequently to the recordation of the chattel mortgage, other persons, firms and corporations have become creditors of the bankrupt and at all times since have been, and now are, creditors of said bankrupt.

That prior to the execution of said chattel mortgage, no notice of intention to mortgage the fixtures and equipment belonging to the bankrupt Sassard & Kimball, Inc., was recorded in the office of the County Recorder of Los Angeles County, California, in which County and State said property was situated, in accordance with the provisions of Section 3440 of the Civil Code of the State of California.

The Trustee filed a petition before the Referee to set aside and avoid this chattel mortgage under Sec-

tion 3440 of the Civil Code of the State of California, Sections 70-E and 47-A of the Bankruptcy Act of 1898 and Amendments thereto, the order to show cause being directed against Sylvan G. Bay, the original owner and holder of the note and mortgage. At the hearing before the Referee, Dr. O. S. Bay, as the real party in interest, was substituted for Sylvan G. Bay. The foregoing facts were stipulated and the Referee decreed the mortgage to be wholly null and void as against the Trustee in Bankruptcy of Sassard & Kimball, Inc., and decreed its cancellation.

The order was filed on February 6, 1930. A review was taken to the District Judge by O. S. Bay and on April 24, 1930, Honorable John M. Killetts, District Judge pro tem., entered an order, together with a memorandum opinion, reversing the order of the Referee decreeing the mortgage to be wholly null and void, and directing that the chattel mortgage be set aside only to the extent of the claims of creditors existing at the time of the execution of the void mortgage and those whose claims came into existence between its execution and recordation. The opinion of Judge Killetts held the mortgage to be valid as to creditors whose claims came into existence subsequently to its recordation and required that the holder of the mortgage be paid in full before the creditors whose claims came into existence after the recordation of the mortgage.

An appeal from this order was allowed by the United States Circuit Court of Appeals for the Ninth Circuit under Section 24-B of the Bankruptcy Act

of the United States of 1898 and Amendments thereto, and upon appeal the United States Circuit Court of Appeals for the Ninth Circuit affirmed the decision of Judge Killetts decreeing the mortgage to be valid in so far as creditors of the third class were concerned, and requiring the Trustee to pay dividends of one hundred per centum to two classes of unsecured creditors of the bankrupt and distribute what was left, after the mortgage was paid, to creditors of the third class.

A petition for rehearing was filed by the Trustee in the United States Circuit Court of Appeals, which petition for rehearing was denied on January 12, 1931.

V.

Your petitioner believes that the judgments of the District Court of the United States for the Southern District of California and the United States Circuit Court of Appeals for the Ninth Circuit should be reversed for the reason that they erred in decreeing the chattel mortgage to be valid as to creditors whose claims came into existence after its recordation, even though bankruptcy had intervened and the Trustee had acquired the rights conferred upon him by Sections 47-A (2), 70-A (4), 70-A (5) and 70-E of the Bankruptcy Act of 1898 and Amendments thereto.

Your petitioner also believes that both lower Courts erred in directing the Trustee to pay dividends of a different per centum to unsecured creditors of the bankrupt whose claims are not expressly classified as debts which have priority under Section 64-B of the

Bankruptcy Act, which order your petitioner believes to be in direct conflict with the provisions of Section 65-A of the Bankruptcy Act of the United States.

Your petitioner also believes that said decisions of both lower Courts are in direct conflict with the decisions of this Court in *Globe Bank v. Martin*, 236 U. S. 288, in so far as the construction of Section 64-B of the Bankruptcy Act of 1898 and Amendments thereto is concerned, and is in direct conflict with the decisions of four Circuit Courts of Appeal in so far as their construction of Sections 67 and 70 of the Bankruptcy Act is concerned.

VI.

Your petitioner annexes hereto his brief in support of this petition.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record of all proceedings in said Circuit Court of Appeals in the case therein entitled, Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Bankrupt, Appellant, vs. O. S. Bay, Appellee, on petition of Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, for review, No. 6147, to the end that said case may be reviewed and determined by this Court as provided by law; and that the judgment of said Circuit Court

of Appeals in said case may be reversed by this Honorable Court.

And that said petitioner may have such other and further relief as may seem meet and proper.

And your petitioner will ever pray.

WM. H. MOORE, JR.,
Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt, Petitioner.

CHARLES F. HUTCHINS,
Attorney for Petitioner.

FRANK C. WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Of Counsel.

United States of America,
Southern District of California,
County of Los Angeles.—ss.

Wm. H. Moore, Jr., being duly sworn, says:

That he is the petitioner in the foregoing entitled matter; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes them to be true.

Wm. H. Moore, Jr.

Subscribed and sworn to before me this 16th day of February, 1931.

(Seal) Bess A. Aldrich,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 2, 1933.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

At the outset of this brief we wish to state that, for the Court's convenience, we are having the opinion of the Circuit Court of Appeals, herein complained of, set out as Appendix "A" at the back of this brief.

Section 1, subdivision 25, of the Bankruptcy Act of 1898 reads as follows:

> "'Transfer' shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security."

Section 70-A of the Bankruptcy Act of 1898, in so far as material here, reads as follows:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Section 70-E of the Bankruptcy Act of the United States of 1898 reads as follows:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide

holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction."

Section 67-A of the Bankruptcy Act of 1898 reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 3440 of the Civil Code of the State of California, in so far as material here, reads as follows:

"* * * Provided, also, that the sale, transfer or assignment of stock in trade, in bulk, or a substantial part thereof otherwise, than in the ordinary course of trade, and in the regular and usual practice and method of business of the vendor, transferor, or assignor, and the sale, transfer, assignment or mortgage of the fixtures or store equipment of a baker, cafe or restaurant owner, garage owner, machinist, or retail or wholesale merchant, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, assignor or mortgagor, unless at least seven days before the consummation of such sale, transfer, assignment or mortgage, the vendor, transferor, assignor or mortgagor or the intended vendee, transferee, assignee, or mortgagee, shall record, in the office of the county recorder in the county or counties in which the said stock in trade, fixtures or equipment are situated a notice of said intended sale,

transfer, assignment, or mortgage, stating the name and address of the intended vendor, transferor, assignor or mortgagor, and the name and address of the intended vendee, transferee, assignee or mortgagee, and a general statement of the character of the merchandise or property intended to be sold, assigned, transferred or mortgaged, and the date when and the place where the purchase price or consideration, if any there be, is to be paid."

Section 65-A of the Bankruptcy Act of the United States reads as follows:

"Dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured."

Section 64-B of the Bankruptcy Act of 1898 reads as follows:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases, and, where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expense of such recovery; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attor-

ney's fees, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary and involuntary cases, as the court may allow; (4) where the confirmation of composition terms has been refused or set aside upon the objection and through the efforts and at the expense of one or more creditors, in the discretion of the court, the reasonable expenses of such creditors in opposing such composition; (5) wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of the proceeding, not to exceed $600 to each claimant; (6) taxes payable under paragraph (a) hereof and (7) debts owing to any person who by the laws of the states or the United States is entitled to priority: Provided that the term 'person' as used in this section shall include corporations, the United States and the several states and territories of the United States."

Section 47-A of the Bankruptcy Act, in so far as material here, reads as follows:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It is the theory of the Trustee in this proceeding, and was likewise the theory of the Referee, and has, until the decision complained of, been regarded as the law in courts of bankruptcy in the State of California, that any transfer of personal property not accompanied by immediate delivery and actual and continued change of possession of the property, as required by Section 3440 of the Civil Code of California, was absolutely void as against a Trustee in bankruptcy, if at the time of the transfer there existed creditors holding provable claims against the estate of the bankrupt. It is true that if bankruptcy had not intervened, only creditors whose rights had been judicially determined, under State law, had a right to attack the transfer because of the provisions of Section 3441 of the Civil Code of the State of California, which required that a creditor's right must be judicially determined before the creditor could avoid the fraudulent act of the debtor.

However the Trustee in bankruptcy stood in a much more favorable category after the adjudication in bankruptcy, because under Section 47-A of the Bankruptcy Act he was placed in the status of an execution creditor with a judgment returned wholly unsatisfied and was further fortified by the provisions of Section 70-A of the Bankruptcy Act which conferred upon him by operation of law the title of the bankrupt to the fraudulently transferred property as of the date of the filing of the petition.

Everett v. Judson, 228 U. S. 474;
Robertson v. Howard, 229 U. S. 254;
Herritt v. Clark (C. C. A. 3rd Cir.), 247 Fed. 100

Prior to the enactment of the Codes of the State of California, in order to make a chattel mortgage valid as to existing creditors, it was necessary that there be an immediate delivery of the property followed by an actual and continued change of possession. The recording statutes of the State of California have done away with the requirement of actual delivery. (Section 2957, Civil Code of California.) The recordation, however, must be as promptly made as delivery would be required, were actual delivery made.

12 *Cal. Juris.*, 994;
Ruggles v. Kennedy, 127 Cal. 290;
Woods v. Bugbey, 29 Cal. 466;
Adlard v. Rogers, 105 Cal. 327;
Rohrbough v. Johnson, 107 Cal. 144;
Edwards v. Sonoma Valley Bank, 59 Cal. 136;
Watson v. Rogers, 53 Cal. 401.

If a chattel mortgage is not promptly recorded after its execution, any creditor who was such during any of the time it was withheld from record and while the property remained in the mortgagor's possession, has a right to levy an execution upon the property and sell it in the same manner as though there had been no attempted transfer or mortgage.

Rohrbough v. Johnson, 107 Cal. 144;
Edwards v. Sonoma Valley Bank, 59 Cal. 148.

The Court will note that the second class of creditors involved in this proceeding were creditors who became such during the period between the execution of the mortgage herein challenged and its recordation,

while the first class of creditors were in existence before its execution and through all of the intervening period down to bankruptcy.

It is our contention that the District Court and the Circuit Court of Appeals erred in restricting the Trustee's rights to set aside and avoid this mortgage only to the extent of the amount of creditors' claims in existence.

(1) Before its execution;

(2) Between the date of its execution and recordation, and placing the pretended lien of this void mortgage ahead of the claims of creditors who

(3) Sold merchandise to the bankrupt after the recordation of the mortgage.

In the first place the Circuit Court of Appeals has divested the Trustee of title to property, which, under Section 70-A, subdivisions 4 and 5 of the Bankruptcy Act of 1898, is expressly conferred upon him. At the date of the filing of the petition the hands of the bankrupt's creditors are stayed and he is powerless to transfer his property to anyone.

Everett v. Judson, 228 U. S. 474.

When a Trustee is elected and qualified, the law confers upon him title to all property transferred by the bankrupt in fraud of his creditors and all property which prior to the filing of the petition in bankruptcy the bankrupt might have transferred or which could have been levied upon and sold under judicial process against him.

But although the Trustee has title to such property, it is sometimes necessary, in order to avoid com-

plications, that his title be judicially determined by a Court of competent jurisdiction. In view of the fact that it was not always possible to find a creditor who had reduced his claim to judgment and had his rights judicially determined, and in view of the holding of this Court in

York Mfg. Co. v. Cassell, 201 U. S. 344

Congress in 1910 amended Section 47-A of the Bankruptcy Act to place the Trustee in the status of a judgment creditor with an execution returned wholly unsatisfied, instead of placing him in the shoes of the bankrupt as had been his prior status. This amendment gave rise to the doctrine that the Trustee in bankruptcy stands in the shoes of the most favored creditor in so far as unrecorded liens against and fraudulent transfers of the bankrupt's property are concerned.

There is no question but that under the laws of the State of California any of the creditors of the bankrupt holding provable claims against it, which claims had accrued either prior to the execution of the mortgage or between its execution and recordation, might have reduced their claims against it to judgment and levied an execution upon this property and sold it, on the ground that it constituted the fixtures of a merchant and had been mortgaged without the notice required under Section 3440 of the Civil Code of California, and that the mortgage thereon had not been promptly recorded.

Rohrbough v. Johnson, 107 Cal. 144.

Section 67-A of the Bankruptcy Act reads as follows:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

Section 67-B of the Bankruptcy Act reads as follows:

"Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor *for the benefit of the estate.*" (Italics ours.)

Therefore, it is our contention that inasmuch as any one of the creditors existing at the time of the delayed recordation of this chattel mortgage, might have levied an execution upon the property, sold it and caused a good title to be conveyed to it at execution sale, the Trustee with the power conferred upon him, as an artificial execution creditor under Section 47-A of the Bankruptcy Act, had the same rights to seize this property and sell it for the benefit of the estate, notwithstanding the void mortgage thereon.

Further, Section 70-E of the Bankruptcy Act gives the Trustee the right to avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and to recover the property so transferred, or its value, from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of adjudication. It is significant that Congress did not see fit to provide in this Section that the Trustee could set aside and

avoid transfers of the bankrupt's property only to the extent of the amount of claims of creditors affected by them. Congress, it will be noted, gave the Trustee blanket power to "avoid *any* transfer by the bankrupt of his property which *any* creditor of such bankrupt might have avoided" without any restrictions being placed upon this power. (Italics ours.)

The District Court and the Circuit Court of Appeals seem to have gone under the theory that under the laws of the State of California, creditors of the bankrupt could only have avoided this mortgage to the extent of the amount of creditors' claims existing at the time of the recordation of the mortgage. In this we respectfully submit both Courts were in error. The Supreme Court of California in *Noyes v. Bank of Italy*, 206 Cal. 266, seems to have held that a Trustee under Section 47-A, as an execution creditor may avoid a mortgage on a bankrupt's property if recordation thereof was delayed or was not properly acknowledged. In this case the Court said:

> "It is insisted, however, that it was not shown that any of the creditors of the bankrupt were in position to attack the mortgage in that it did not appear that any of them were creditors who had acquired a lien upon the mortgaged property by virtue of some legal proceeding or who had come armed with some process authorizing seizure of the property and that a mere creditor at large may not attack the mortgage. It is urged that the case of Loosemore v. Baker, 175 Cal. 420 (166 Pac. 26), citing Ruggles v. Cannedy, 127 Cal. 290, is directly in point and is controlling here. We think a sufficient answer to the contention lies in the

fact that whatever the status of the creditors may be in this case, the Bankruptcy Act has supplied the deficiency which the defendant claims to have existed and has vested the trustee in bankruptcy with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied. Section 47 (a) 2 of the Bankruptcy Act, June 25, 1910 (Chap. 412, sec. 8, 36 Stats. at Large, 838, 840; Comp. Stats. 1913, Secs. 9586, 9631; U. S. Code (U. S. C. A.), title 11, sec. 75), provides: 'And such trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.'

"Interpreting said section 47 (a) 2 of the Bankruptcy Act the Supreme Court of the United States has held that the trustee acquired a lien status as of the time when the petition in bankruptcy was filed.' (Bailey v. Baker Ice Machine Co., 239 U. S. 268; 36 Sup. Ct. Rep. 50); (see also Martin v. Commercial National Bank, 245 U. S. 513; 38 Sup. Ct. Rep. 176, see also Rose's U. S. Notes) 4 Cal. Jur. pp. 59, 60, 62, 63, and cases cited)."

Further down the Court says:

"In other words, the trustee was intended to be placed in the position of a lien creditor who would, but for the bankruptcy proceedings, be entitled to attack the alleged void mortgage and to

enable him to protect the interests of general creditors against invalid liens, unlawful transfers, etc. I Collier on Bankruptcy, 12th ed., p. 728, et seq."

The Supreme Court of California also passes on the question as to the position of the trustee in stepping into the shoes of creditors whose claims came into existence between the date of the execution of the mortgage and its recordation. In that regard the Court says:

"The term *creditors* is general and applies to creditors existing prior to the mortgage, as well as subsequent." Citing *Cardenas v. Miller,* 108 Cal. 250.

The Supreme Court of California also discussed with approval the doctrine laid down by the United States District Court for the Southern District of California in the *Matter of Hazson,* 268 Fed. 904, in which the United States District Judge Bledsoe decreed a chattel mortgage withheld from recordation twenty-one (21) days after its acknowledgement to be null and void in so far as creditors were concerned. See also

Pierson v. Hickey, 16 S. D. 46;
Butler v. San Francisco Gas Co., 168 Cal. 32;
Bull v. Ford, 66 Cal. 176;
Oliver v. Bennamm, 292 Fed. 201.

CONFLICT OF APPELLATE COURTS.

Regarding the conflict of authorities on which this petition for writ of certiorari is based, we find that this question has been before five Circuit Courts of Appeal. The Fourth Circuit, the Fifth Circuit, the Sixth Circuit and the Eighth Circuit have held that when a trustee in bankruptcy sets aside a transfer of the bankrupt's property, void under state law, he avoids it in its entirety for the benefit of all of the creditors of the bankrupt. The Ninth Circuit, in the case at bar, has held to the contrary. The pioneer decision on this question in an appellate court was the *Matter of Kohler*, 159 Fed. 871, in which the United States Circuit Court of Appeals for the Sixth Circuit held that a transfer set aside under Section 67-A and 67-B, under an Ohio statute was set aside for the benefit of all creditors. The second decision was *Mullen v. Warner*, 11 Fed. (2nd) 62, in which the United States Circuit Court of Appeals for the Fourth Circuit held that a Trustee in avoiding a transfer of the bankrupt's property under Section 70-E of the Bankruptcy Act set it aside not for the benefit of antecedent creditors alone, but for the benefit of all of the creditors of the bankrupt. In this case the decision of the Circuit Court of Appeals for the Fifth Circuit in *American Trust Co. v. Duncan*, 254 Fed. 780, which held that the Trustee avoided the transfer for the benefit of creditors affected by it alone, and not for the benefit of all, was discussed at length. The Court criticised this opinion, and we note from the examination of later authorities that the Circuit Court of Appeals for the Fifth Circuit in

Campbell v. Dalbey, 32 Fed. (2nd) 229, subsequently receded from the position taken by it in *American Trust Co. v. Duncan*, supra. The third decision by a Circuit Court of Appeals is *Lytle v. Andrews*, 34 Fed. (2nd) 252, handed down by the United States Circuit Court of Appeals for the Eighth Circuit in 1929, in which the Circuit Court of Appeals said:

> "Although Lytle was not in name an officer of the corporation, he was nevertheless an active participant in a scheme to use the corporate assets to retire his own stock and in that way to defeat the rights of creditors. At least *one creditor*, the Sioux National Bank, exists whose claims are not satisfied. The trustee therefore has the right to set aside this transfer, and when it is set aside the recovery inures to the benefit of *all* creditors of the bankrupt estate." (Italics ours.)

The fourth decision of a Circuit Court of Appeals which conflicts with the opinion of the Court in the case at bar is *Campbell v. Dalbey*, 23 Fed. (2nd) 229, in which the Circuit Court of Appeals for the Fifth Circuit said:

> "As is stated in the former opinion in this case, the trustee, even though the right to preserve the lien under section 67f had been lost, had the right to avoid under section 70e any transfer by the bankrupt which any creditor might have avoided. The bank's suit was brought within one year from the giving of the mortgage, and was not prescribed by the state law (La. Revised Civil Code, art. 1987); and the judgment of the state court which set aside that mortgage in so far as it affected the bank is authorized by article

1977 of that code. It follows from section 70e that the trustee not only succeeded to the bank's right to avoid appellant's mortgage to the partial extent that it affected the bank, *but also was given the authority to avoid that mortgage fully and completely and recover the entire mortgaged property or its value, for the benefit of all the creditors of the bankrupt.* Stellwagen v. Clum, 245 U. S. 605; 41 A. B. R. 1, 38 S. Ct. 215, 62 L. Ed. 507." (Italics ours.)

See also:

Farmers Cooperative Company v. Barlow, 202 Fed. 1008, D. C. N. D.

The last named decision handed down by the Fifth Circuit is in our opinion a complete reversal of the stand taken by it many years ago in *American Trust and Savings Bank v. Duncan,* 254 Fed. 780.

The next question that arises is the question as to how a trustee can distribute the avails of an action to avoid a fraudulent transfer in unequal dividends to three different classes of creditors, paying the class of creditors affected by the void transfer or mortgage one hundred cents on the dollar first, then paying the holder of the void mortgage the amount claimed by him under it and leaving the subsequent creditors to take what is left, if there is anything.

This Court has passed squarely on the question of whether or not the creditor who would have had a right to avoid a transfer had bankruptcy not intervened, was entitled to preferential treatment at the hands of the Trustee in the distribution of the avails of a recovery where a void transfer was set aside.

The decision we refer to is *Globe Bank v. Martin*, 236 U. S. 288, in which this Court held that a creditor who might have avoided the transfer of the bankrupt's property, had not bankruptcy intervened, was not a holder of "debts owing to any person who by the laws of the state or United States is entitled to priority." In that case this Court said:

> "It is contended, however, by the appellants, that if we assume that under section 67f of the Bankruptcy Act, the property or its proceeds must come to the trustee, to be distributed by him under the orders of the bankruptcy court for the benefit of the estate, that inasmuch as, under the statute of Kentucky, creditors existing prior to the making of the deal in question were entitled to be preferred in the distribution of the proceeds, that right is protected by sub-section 5 of section 64b of the Bankruptcy Act, which provides that the debts to have priority, except as therein provided, and to be paid in full out of bankrupt estates, are, among others,
> 'debts owing to any person who, by the laws of the states or the United States, is entitled to priority':
> and it is contended that this sub-section as considered by the Circuit Court of Appeals of the Sixth Circuit in an opinion written by the late Justice Lurton (Re Bennett, 18 A. B. R. 320, 152 Fed. 673), maintains that position. But an examination of that case shows that it dealt with a statutory lien created under section 487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplies to manufacturing companies, and creating a lien upon the property in cases of such companies in case of an assignment for the benefit of creditors, or where

the property is distributed among creditors by operation of law or by act of the company. It was held that such statutory lien gave a substantial right in or inchoate lien upon the property from the date of furnishng the material, within the spirit and meaning of section 64b, subsection 5, of the Bankruptcy Act. That case, and such cases as Re Laird (C. C. A., 6th Cir.), 6 A. B. R. 1, 109 Fed. 550, which dealt with labor claims, recognize the purpose of Congress in passing section 64b, to maintain statutory liens and preferences in such cases in the distribution of the bankrupt estate."

If creditors existing at the time of the void transfer complained of are not such creditors as are included in Section 64-B, subdivision 7, they cannot possibly have a preferred standing under any of the provisions of the Bankruptcy Act. Section 64-B expressly sets out all of the claims of creditors having priority in the distribution of funds of a bankrupt estate, including only the following:

(1) Expenses of preserving the assets subsequent to the filing of the petition,

(2) Filing fees paid by creditors in involuntary cases and where property of the bankrupt is transferred or concealed by him either before or after the filing of the petition, which have been recovered for the benefit of the estate of the bankrupt by the efforts and at the expense of one or more creditors, the reasonable expenses of such,

(3) Costs of administration and attorney fees,

(4) Expense of successfully resisting a composition, incurred by one or more creditors,

(5) Wages due workmen, servants, clerks, etc.,

(6) Taxes.

On the contrary, section 65-A expressly requires that:

"Dividends of an equal percentum shall be declared and paid on all allowed claims, except such as have priority or are secured."

Therefore in view of the fact that a conflict exists on a question as important as this, with four Circuit Courts of Appeal holding one way and one Circuit holding another, we respectfully submit our petition for a writ of certiorari to this Court. That the question is of vital importance in the mercantile world cannot be questioned. If a transfer, which the statute of a State denounces as conclusively presumed to be fraudulent and void as to existing creditors, may only be set aside by the Trustee to the extent of the amount of creditors' claims affected by it, we earnestly contend that a dangerous situation exists which can be cured only by a new amendment to Section 70-E of the Bankruptcy Act, unless this Court interferes and reverses the holding of the Circuit Court of Appeals for the Ninth Circuit. Under this rule it would be possible for a bankrupt to transfer a hundred thousand dollars' worth of property at a time when he only owed $5,000 and later incur indebtedness many times the value of the property. The Trustee would be powerless to avoid it beyond the sum of $5,000, even though the holder of the property might be an actual fraudulent grantee. Although the Circuit Court of Appeals for the Ninth Circuit did not ex-

pressly say that it would hold the same thing in a case where actual fraud was proven, the principle laid down is nevertheless dangerous to say the least. In many cases, personal property is transferred without change of possession and fictitious indebtedness of many years back is conjured up by the bankrupt and his fraudulent transferee for the purpose of bolstering up the transfer. It was to avoid the debtor's attempts to have his cake and eat it that Section 3440 of the Civil Code of California was passed. That Section forbids a debtor to transfer his personal property to anyone and at the same time use and enjoy it. It makes such a transfer or mortgage absolutely void as to his creditors while he remains in possession, and either prior or subsequent creditors may attack such a void transfer or mortgage, if they see fit. *Noyes v. Bank of Italy*, 206 Cal. 266.

Under the dissenting construction of Section 65-A by the Circuit Court of Appeals for the Ninth Circuit, the Bankruptcy Act will be robbed of its uniformity in a substantive chapter thereof. Creditors of bankrupts guilty of fraudulent transfers having their domiciles in the Fourth, Fifth, Sixth and Eighth Circuits will be entitled to dividends based on 100% of the value of the Trustee's recovery of the fraudulently transferred property and all creditors of the bankrupt will be treated alike in the distribution. The creditors of bankrupts who have their domicile in the Ninth Circuit will be compelled to take the leavings, after all creditors whose claims existed at the time of the transfer have been paid one hundred cents on the dollar and the fraudulent transferee, or mort-

gagee, fully taken care of. We believe that this construction placed upon Section 65-A of the Bankruptcy Act by the Ninth Circuit Court of Appeals is wholly out of harmony with both the letter and spirit of uniformity so characteristic of the Bankruptcy Act.

It is our understanding that this Court does not want an exhaustive brief in connection with a petition for a writ of certiorari, therefore this brief is not as comprehensive or detailed as the brief that we shall file in support of our contention, should our petition for a writ of certiorari be granted.

Respectfully submitted,

CHARLES F. HUTCHINS,
Attorney for Petitioner.

FRANK C. WELLER,
JAMES P. KELEHER,
THOMAS S. TOBIN,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1930

No.

In the Matter of
SASSARD & KIMBALL, INC.,
Bankrupt,

and

WM. H. MOORE, JR., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,
Appellant and Petitioner,

vs.

O. S. BAY,
Appellee and Respondent.

CERTIFICATE OF COUNSEL.

I, the undersigned, a member of the Bar of the Supreme Court of the United States hereby certify that the foregoing petition for a writ of certiorari in the above entitled matter is in my opinion well

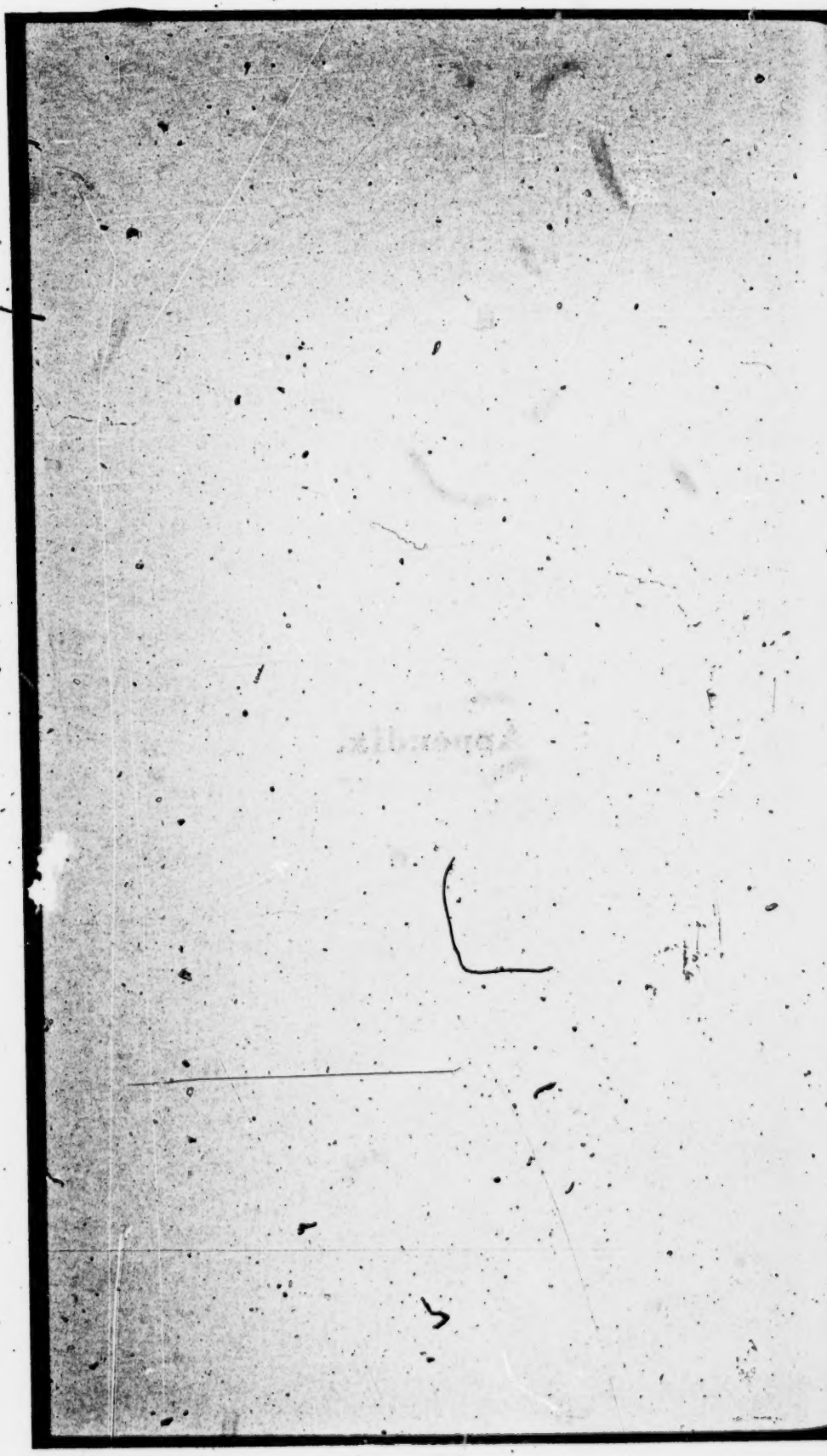
founded and meritorious, and that said petition is not interposed for the purpose of hindering or delaying the appellee herein.

Dated at Los Angeles, in the Southern District of California, this 31st day of January, 1931.

CHARLES F. HUTCHINS,
Attorney for Appellant.

(Appendix Follows.)

Appendix.



Appendix

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 6147

Wm. H. Moore, Jr., Trustee in Bankruptcy for the Estate of Sassard & Kimball, Inc., Bankrupt,

Appellant,

vs.

O. S. Bay,

Appellee.

Upon appeal from the District Court of the United States for the Southern District of California, Central Division.

Before Rudkin and Wilbur, Circuit Judges, and Norcross, District Judge.

Opinion

Norcross, District Judge:

This is an appeal from an order made by the court below reversing a ruling of the Referee in Bankruptcy holding a certain chattel mortgage void as to all creditors.

The facts are stipulated and those material are as follows: At all times important to be considered in

this case Sassard & Kimball, Inc., was a corporation engaged in the business of a merchant selling automobiles, automobile parts and accessories. On the 31st day of December, 1929, the corporation filed a voluntary petition in bankruptcy and on the same date appellant was appointed receiver for the estate of the bankrupt and, upon qualifying, took into his possession all property claimed to be a part of the estate, including that covered by a certain chattel mortgage in question. On November 23, 1928, the bankrupt executed a chattel mortgage as security for the payment of a certain promissory note for $10,000, payable thirty days after date to the assignor of appellee. The mortgage was acknowledged of date November 30, 1928, the affidavit of good faith was executed December 5, 1928, and the instrument filed for record and recorded by the County Recorder of Los Angeles county on December 19, 1928. The chattel mortgage covered a certain Studebaker service car, a Ford roadster, the furniture, show room and shop equipment of the bankrupt. Prior to the execution or filing of the mortgage no notice of intention to mortgage the stock in trade, fixtures and equipment belonging to the mortgagor was recorded in accordance with the provisions of section 3440 of the Civil Code of California. In relation to the mortgage, the proceeding presents three classes of creditors of the bankrupt: 1. Those existing at the date of the mortgage. 2. Those who became such between the date of the mortgage and its recordation. 3. Those so becoming subsequent to the recording of the mortgage.

Section 3440 of the Civil Code of California provides that a chattel mortgage "will be conclusively presumed to be fraudulent and void as against the existing creditors * * * unless at least seven days before the consummation of such * * * mortgage the mortgagor * * * shall record in the office of the county recorder * * * a notice of said intended * * * mortgage," setting out the particulars of its proposed effect and purpose.

It is clear that the motgage, by reason of the provisions of the statute, is void as to creditors of the first class, and it is conceded it is also void as to those of the second class. As held by decisions of the Supreme Court of California, the mortgage would be valid as against creditors of the third class. (*Ruggles v. Cannedy*, 127 Cal. 290; *United Bank and Trust Co. v. Powers*, 89 Cal. App. 690.)

It is the contention of appellant that under section 70E of he Bankruptcy Act of 1898 the mortgage in question, being void as to one creditor or class of creditors, is void in toto at the suit of the trustee.

Section 70E of the Bankruptcy Act reads:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such

recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

There is no express language in this section which specifically gives to any unsecured creditor of a bankrupt any greater rights or any secured creditor any less right than he had before adjudication in bankruptcy. The rights of a trustee in bankruptcy to "avoid any transfer" are no greater than those of a creditor or particular class of creditors. It is clear, we think, that a trustee in bankruptcy is limited in his control and disposition of the estate of the bankrupt to the rights of creditors as such rights existed and could be enforced under the state law prior to the time proceedings in bankruptcy were instituted. This is not a case of an ordinary transfer of property in whole or in part in fraud of creditors, but a case of a transfer made void by statute only as to a specific class of creditors. In *National Bank v. Moore*, 247 Fed. 913, this court said:

"The trustee, in the interest of the general creditors, may therefore contest any claim of lien that a judgment creditor might contest if bankruptcy had not intervened."

In the case at bar only judgment creditors of the first or second class specified could have successfully contested the mortgage had not bankruptcy intervened.

We quote with approval the following from the memorandum opinion of Judge Killits filed in the court below:

"In 1910, the bankruptcy act was amended to make clear the position of the Trustee. It seems to have been the theory of the Referee that the effect of this amendment, which gave the Trustee the status of an execution creditor, so far affected the status of the creditors of each of the three classes, as against the mortgage, as to place them all on the same level of superiority. In this we are very clear that the Referee was wrong. There is nothing whatever in the cause for, or the language of the amendment of 1910 to produce such a result. The Trustee indeed represents all creditors, but only as their respective interests in the property under administration were fixed by local law when the bankruptcy proceedings intervened, and it is his duty to administer and distribute accordingly as he finds at that time liens or inferiorities of respective creditors were established. If at that time any creditors had no inchoate right under existing state laws to reduce his claim to judgment and thereby establish a lien by execution superior to an existing and recorded mortgage, he is bound in distribution to recognize the latter's superior position. It is said, as a settled law in federal courts, that there is so much of local nature entering into chattel mortgages that federal courts accept as decisive the state law fixing the priority of such encumbrance. *Etheridge v. Sperry*, 139 U. S. 266. See, also, *In re Baxter and Co.*, 154 Fed. 22; and *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223."

In *Peters v. Bain*, 133 U. S. 670, considering a statute relating to fraudulent conveyances somewhat similar to the statute here in question, the Supreme

Court reiterated the views of that court that it would accept the conclusions of the highest court of the state as controlling.

It is contended in the brief of appellant that one of the cars covered by the mortgage was part of the bankrupt's stock in trade and hence was not subject to chattel mortgage under section 2955, California Civil Code. As this question does not appear to have been presented to or considered by the referee or court below, we express no opinion. If there is merit in the contention it may be presented in the further bankruptcy proceedings.

The order is affirmed.

Filed Dec. 6, 1930.

Paul P. O'Brien, Clerk.